646 (2001).[4] It is clear that Section 408 is based on traditional tort principles, and therefore the full panoply of procedural and evidentiary requirements would necessarily apply.

The ATSSSA thus provides September 11 victims and their families with two completely separate alternatives, either of which they were free to elect. Claimants who sought a simple, expeditious, and certain recovery could elect to avail themselves of the VCF procedures under Section 405, but to be eligible were required to waive their right to litigate. For those who preferred to litigate, Section 408's federal cause of action was available.

Plaintiffs Elected To Receive Compensation From The VCF

In this case, Plaintiffs chose to pursue VCF compensation under Section 405. Therefore, as both the district court and the court of appeals held, Plaintiffs waived their right to file a civil action under Section 408. In affirming the district court's dismissal of the litigation, the court of appeals wrote:

> We agree with the district court that under the plain language of the statute, claimants who have filed claims with the Fund have waived "the right to file a civil action . . . for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001" and that the waiver bars claims for "damages sustained" against non-airline defendants. We affirm the district court's determination and find plaintiffs' claim barred by their election of remedies.

407 F.3d at 112.

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[4] Section 405 contains no similar upper limit on the amount of money that may be paid to a claimant who elects to file a claim with the VCF.

PROCEEDINGS BELOW

On December 22, 2003, Plaintiffs commenced this lawsuit against the City only. On January 20, 2004, Plaintiffs amended the Complaint to join Motorola as a defendant. Plaintiffs filed this action even though they had filed claims with the VCF and ultimately received compensation from the VCF.

In early February 2004, Motorola and the City moved to dismiss the Complaint. On March 10, 2004, the district court issued a decision and order granting the motion in its entirety. In that order, Judge Hellerstein found that the ATSSSA's waiver of litigation provision—Section 405(c)(3)(B)(i)—is unambiguous and applied to actions against Motorola and the City.

Plaintiffs filed a timely appeal with the court of appeals. On appeal, Plaintiffs argued that the waiver provision was ambiguous and that it did not apply to Motorola because Congress intended the waiver to apply only to airlines and entities who could have prevented the terrorist attacks. Plaintiffs also raised two issues for the first time on appeal. First, Plaintiffs argued that, even if the waiver of litigation provision applied to Motorola and the City, the waiver provision barred only the recovery of compensatory damages and not punitive damages. Second, Plaintiffs argued that the district court committed error because it did not determine whether Plaintiffs' waiver of litigation was knowing and intelligent.[5]

The court of appeals affirmed the district court's opinion in its entirety. It found that the language of the waiver provision in Section 405 of the ATSSSA was

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[5] Plaintiffs have abandoned this argument in their petition to this Court.

unambiguous and "plainly requires litigants to choose between risk-free compensation and civil litigation." *Virgilio*, 407 F.3d at 114. The court of appeals also rejected Plaintiffs' contention that the waiver applied only to compensatory damages, finding that the waiver provision unambiguously covers all civil actions regardless of the nature of the damages sought. The court of appeals refused to consider Plaintiffs' argument that the district court should have determined whether the waiver in this case was knowing and intelligent.

Plaintiffs petitioned the court of appeals for rehearing and rehearing *en banc*. In that petition, Plaintiffs asked the court of appeals to certify to the New York Court of Appeals the "question of whether a plaintiff can pursue a cause of action for punitive damages alone where the plaintiff's compensatory damages, but not his entire cause of action, has been satisfied." On July 15, 2005, the court of appeals denied the petition for rehearing.

Plaintiffs then filed their petition with this Court. We respectfully submit that the petition should be denied for the reasons set forth below.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE ATSSSA'S WAIVER OF LITIGATION PROVISION UNAMBIGUOUSLY BARS THIS LITIGATION, AND THAT HOLDING DOES NOT CONFLICT WITH OTHER SECOND CIRCUIT DECISIONS

Both the court of appeals and the district court held that Section 405's waiver of litigation provision is unambiguous and bars all civil actions for damages sustained in the September 11th attacks, except, as the statute

expressly provides, actions against the terrorists and actions to recover collateral source obligations. Indeed, the court of appeals commented, "If this waiver provision is ambiguous as plaintiffs suggest, few if any statutory provisions could be viewed as clear." *Virgilio*, 407 F.3d at 113.

In reaching its decision, the court of appeals necessarily rejected Plaintiffs' argument that the phrase "damages sustained as a result of the terrorist-related aircraft crashes" as used in the Section 405 waiver provision is ambiguous and does not cover actions against Motorola. In making that argument, Plaintiffs pointed to similar phrases in Section 408, an entirely separate provision, to contend that the Section 405 phrase is more limited in scope and somehow excludes Motorola. In their petition, Plaintiffs continue to pursue that argument and further argue that two Second Circuit decisions interpreting *Section 408* are somehow in conflict with the Second Circuit's decision in this case which interprets *Section 405*. Both arguments are misguided.

A. Section 405 Is Unambiguous

As both courts below found, Section 405 is unambiguous and plainly provides that September 11th victims who elect to receive VCF compensation *waive* their right to file a civil action (except for two specific categories of claims not relevant here):

> Upon the submission of a claim under this title, *the claimant waives the right to file a civil action (or to be a party to an action) in any Federal or State court* for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001. The preceding sentence does not apply to a civil action to recover collateral source obligations, or to a civil action against any person who is a

> knowing participant in any conspiracy to hijack any aircraft or commit any terrorist act.

ATSSSA § 405(c)(3)(B)(i) (emphasis added), *as amended by* TSA § 201(a). The court of appeals further explained as follows:

> The language of the waiver provision clearly states that Fund claimants waive their right to bring civil actions resulting from any harm caused by the 9/11 attacks: "[u]pon the submission of a claim . . . , the claimant waives the right to file a civil action . . . in any Federal or State court for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001." Air Stabilization Act § 405(c)(3)(B)(i). The waiver provision plainly requires litigants to choose between risk-free compensation and civil litigation. *If this waiver provision is ambiguous as plaintiffs suggest, few if any statutory provisions could be viewed as clear.*

407 F.3d at 113 (emphasis added).[6]

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[6] The court below found it unnecessary to examine the ATSSSA's legislative history because it found that the waiver language is clear and unambiguous. 407 F.3d at 112. The available legislative history confirms that Congress intended September 11th victims to choose between the VCF and litigation. *See* Statement of Representative Conyers ("By submitting a [VCF] claim, the claimant waives the right to file or be a party to a civil action for damages as a result of the events of September 11, 2001.") 147 Cong. Rec. H5894-02, H5914 (2001); 147 Cong. Rec. S9589-01, S9594 (statement of Sen. McCain) ("[V]ictims and their families may, but are not required to, seek compensation from the Federal fund instead of through the litigation system."); *Id.* at S9599 (statement of Sen. Leahy) ("Filing a claim under the program will preclude other civil remedies."); *Id.* at S9602 (statement of Sen. Nickles) ("[V]ictims and/or their family survivors, people who were killed by the terrorist act of September 11, may receive financial assistance or at least have legal recourse . . . *either* by suing in a Federal district court *or* . . . through a new system we are now creating in this legislation called the special master.") (emphasis added).

The court of appeals then specifically found that Plaintiffs' claims are "within the scope of the waiver provision," because the Plaintiffs' damages arose "as a result of" the terrorist-related attacks. *Id.* In making this finding, the court of appeals rejected Plaintiffs' argument that the waiver provision was intended to exclude the allegedly independent acts of Motorola. The court below found that Plaintiffs overlooked "the very language of the statute that defines their eligibility for compensation" from the VCF. 407 F.3d at 114. That language provides that anyone who was injured or killed "as a result" of the September 11th attacks may file a VCF claim. Accordingly, the phrase "as a result" of the September 11th attacks is used twice in Section 405: first to define who may file a VCF claim and then to provide that those very same individuals waive the right to file a civil action. The court of appeals noted the inconsistency in Plaintiffs' argument:

> In our view, plaintiffs cannot embrace the statute's broad view that many people, in widely differing circumstances, died "as a result" of the attacks while simultaneously constricting the same language in the waiver to include only the airlines.

407 F.3d at 114.

Notwithstanding the clear and unambiguous language of § 405, Plaintiffs attempt to create an additional exception to the waiver provision for "acts and omissions not incident to the aircraft crashes." *See* Petition at 16. In the ATSSSA, Congress provided for two specific exceptions to the waiver of litigation provision: actions against terrorists and lawsuits to recover collateral source obligations. Because Congress explicitly enumerated those two exceptions, the courts below properly declined to create additional exceptions. *Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-617 (1980) ("Where

Congress explicitly enumerates certain exceptions . . . additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.") (quoted in *United States v. Smith*, 499 U.S. 160, 167 (1991)); *In re Bell*, 225 F.3d 203, 214 (2d Cir. 2000).

B. No Conflict Exists Between The Decision Of The Court Below And Other Second Circuit Jurisprudence

In an effort to create an ambiguity in Section 405's waiver provision where none exists, Plaintiffs contend in their petition that a conflict exists between the decision below and other Second Circuit cases interpreting the ATSSSA. Plaintiffs are wrong.

First, Second Circuit jurisprudence has consistently held that the ATSSSA provides September 11th victims with an election of remedies, and that those victims who file VCF claims waive their right to file a civil action. *See Schneider*, 345 F.3d at 139 ("eligibility for compensation from the Fund is conditioned upon a waiver by claimants of 'the right to file any civil action' in state or federal court. . .") (quoting ATSSSA § 405(c)(3)(B)(i)); *Canada Life Assurance Co. v. Converium Rückversicherung AG*, 335 F.3d 52, 55 (2d Cir. 2003) ("Title IV establishes the September 11th Victim Compensation Fund, which provides to those killed or injured in the attacks the option of federal compensation in exchange for a waiver of their rights to file a civil action for damages resulting from the events of September 11."); *see also In re September 11th Litig.*, No. 21MC97, 2004 WL 1320897, at *1 (S.D.N.Y. June 10, 2004) ("Congress gave the victims of the terrorist-related aircrashes of September 11, 2001 and their families a choice of remedy: the [VCF] or a traditional lawsuit, and required claimants to choose between them."); *In re World Trade*

Center Disaster Site Litig., 270 F. Supp. 2d 357, 362 (S.D.N.Y. 2003) ("If the claimant chose to file with the Fund, that filing operated as a waiver of the right to file a civil action 'in any Federal or State Court for damages as a result of the terrorist-related aircraft crashes of September 11, 2001.' ") (quoting ATSSSA § 405(c)(3)(B)(i)); *Int'l Fine Art & Antique Dealers Show, Ltd. v. ASU Int'l, Inc.*, No. 02 CIV 534, 2002 WL 1349733, at *4 (S.D.N.Y. June 20, 2002) ("Eligible individuals may either elect to file a claim through the Special Master for compensation from a federal fund, or pursue a claim for damages"). The decision of the court of appeals in this case is completely consistent with prior Second Circuit precedent.

Second, no conflict exists between the decision below and the two specific Second Circuit decisions Plaintiffs rely on for their argument, *Canada Life Assurance Co. v. Converium Rückversicherung (Deutschland) AG*, 335 F.3d 52 (2d Cir. 2003) and *In re WTC Disaster Site*, 414 F.3d 352 (2d Cir. 2005). Those cases interpreted Section 408 of ATSSSA, a completely different provision from Section 405, the one at issue in this case. Section 408 creates a federal cause of action and vests jurisdiction for all such claims with the Southern District of New York:

> (3) JURISDICTION. The United States District Court for the Southern District of New York shall have original and exclusive jurisdiction over all actions brought for any claims (including any claims for loss of property, personal injury, or death) *resulting from or relating to* the terrorist-related aircraft crashes of September 11, 2001.

ATSSSA § 408(b)(3) (emphasis added).

In *Canada Life* a Canadian reinsurer sued a German reinsurer, alleging that the German company had refused to pay its shares of losses, many of which resulted from the terrorist acts of September 11, 2001. The Canadian company filed suit in the Southern District of New York citing Section 408 of the ATSSSA as the sole basis for federal court jurisdiction. The sole issue on appeal was whether the insurance claims were "resulting from or related to" the terrorist acts for purposes of federal jurisdiction under Section 408. The Second Circuit denied that there was jurisdiction under Section 408, stating: "Congress cannot have intended the absurd result of requiring every lawsuit involving economic losses traceable to September 11 to be brought in the Southern District." 335 F.2d at 58.

In *In re WTC Disaster Site*, workers who were involved in the September 11 cleanup sought damages for respiratory injuries sustained during that work. The relevant issue on appeal was whether these respiratory injuries "resulted from or related to" the terrorist acts for purposes of federal jurisdiction under Section 408. The Second Circuit found that Section 408 was ambiguous but after reviewing the statutory history reached the conclusion that Section 408 should be read as "sufficiently expansive to cover claims of respiratory injuries by workers in shifting, removing, transporting, or disposing to the debris." 414 F.3d at 377. It is patently clear that both *Canada Life* and *In re WTC Disaster Site* addressed solely the language of Section 408 of the ATSSSA. Neither case concerned whether the plaintiffs had waived their right to sue by filing for compensation with the VCF, the central issue presented here.

Although *Canada Life* and *In re WTC Disaster Site* involved the interpretation of Section 408, Plaintiffs rely on those cases to argue that Section 405 is ambiguous. In

both *Canada Life* and *In re WTC Disaster Site*, the Second Circuit acknowledged that the phrases used in Section 408 to define the breadth of the federal cause of action created by ATSSSA ("arising out of" and "resulting from or relating to" the terrorist attacks) are ambiguous. But the Second Circuit never addressed whether the relevant language in Section 405 ("as a result of" the terrorist attacks) is ambiguous. On the contrary, in *In re WTC Disaster Site*, the court of appeals distinguished Section 405 from Section 408, in part by noting the "exacting criteria" set forth in Section 405 concerning the place and the timing of injury in order to qualify for VCF benefits: Section 405 covers only individuals who were on one of the planes or at one of the three crash sites at the time of or in the immediate aftermath of the September 11 attacks. 414 F.3d at 375. In contrast, Section 408 "imposes no such criteria." 414 F.3d at 376. There is no question that in this case plaintiffs' decedents met the Section 405 criteria, and therefore were covered by Section 405, including its waiver of litigation provision.

The decision below is the only decision discussing whether Section 405 is ambiguous. As discussed above, the meaning of Section 405 could not be more clear: persons who are eligible for VCF compensation, such as Plaintiffs here, are the same persons who waive the right to file a civil action. Moreover, language from Section 408 cannot be relied upon to alter the unambiguous language of Section 405. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 480 (1992) ("The plain meaning [of a provision] . . . cannot be altered by the use of a somewhat different term in another part of the statute.").

II. The Court Of Appeals Correctly Held That Plaintiffs' Waiver Of Litigation Encompasses Claims For Punitive Damages

Plaintiffs' second argument is that even if the ATSSSA's waiver of litigation provision applies to their action against Motorola and the City, it somehow does not apply to actions for punitive damages. This argument fails under both the ATSSSA and applicable New York law.

A. The ATSSSA's Waiver Provision Applies To All Actions, Including Those Seeking Punitive Damages

The court of appeals correctly concluded that under the plain language of Section 405(c)(3)(B)(i), "plaintiffs have waived their right to file 'a civil action' for damages sustained." *Virgilio*, 407 F.3d at 117. In reaching its decision, the court below stated that, "Plaintiffs had the right to seek damages to redress the wrongs they and their loved ones suffered . . . . That right encompassed compensatory damages and, if appropriate, punitive damages for egregious conduct." *Id.* The court concluded that allowing Plaintiffs who received compensation from the VCF to seek punitive damages in a separate civil proceeding would "abrogate the clear language of Congress that once a [VCF] claim is made, the universe of potential defendants is constricted to only terrorists responsible for the carnage and collateral-source providers." *Id.* at 118.

In reaching its decision, the court of appeals rejected the Plaintiffs' semantical argument that use of the phrase "damages sustained" in Section 405's waiver provision somehow limits the waiver to only claims for compensatory damages.

B. New York Law Bars Plaintiffs From Suing Solely For Punitive Damages

Under New York law, it is axiomatic that there can be no recovery for punitive damages without a claim for compensatory damages.[7] *Rocanova v. Equitable Life Assurance Soc'y of U.S.*, 634 N.E.2d 940, 83 N.Y.2d 603 (1994). The court of appeals correctly found that pursuant to *Rocanova* "once a claim for compensatory injuries is barred, the possibility of a punitive award is likewise relinquished." 407 F.3d at 117.

In *Rocanova* plaintiff asserted four causes of action against defendant. As part of a settlement at arbitration, plaintiff released defendant from "all debts, claims, demands, damages, actions and causes of action" related to the case. Plaintiff then sought to pursue a claim for punitive damages in New York State Supreme Court. The Court of Appeals held that the "release bars [plaintiff's] remaining causes of action [and plaintiff] cannot recover punitive damages since [plaintiff] is unable to assert an underlying cause of action upon which a demand for punitive damages can be grounded." *Rocanova*, 83 N.Y.2d at 616, 612 N.Y.S.2d at 339, 634 N.E.2d at 940. "A demand or request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action such as fraud." 634 N.E.2d at 945, 83 N.Y.2d at 616; *see also Omansky v. 64 N. Moore Assocs.*, 703 N.Y.S.2d 471, 472, 269 A.D.2d 336, 337 (1st Dept. 2000) (holding claim for punitive damages correctly dismissed "since the only cause of action on which such prayer was based

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[7] The ATSSSA invokes the substantive law of the state of injury. *See* ATSSSA, Title IV Sec. 408(b)(2) ("The substantive law for decision in any [civil] suit shall be derived from the law, including choice of law principles, of the State in which the crash occurred unless such law is inconsistent with or preempted by Federal law.").

has been dismissed for mootness"); *Moran v. Travelers Ins. Co.*, 604 N.Y.S.2d 851, 851, 197 A.D.2d 928, 928 (4th Dept. 1993) (affirming dismissal of claim for punitive damages where no claim for actual damages because "there exists no independent cause of action for punitive damages"); *A.W. Fiur Co., Inc. v. Ataka & Co.*, 422 N.Y.S.2d 419. 424, 71 A.D.2d 370, 375 (1st Dept. 1979) (affirming dismissal of claim for punitive damages because "there is no independent cause of action for punitive damages"); *APS Food Sys., Inc. v. Ward Foods, Inc.*, 421 N.Y.S.2d 223, 226, 70 A.D.2d 483, 488 (1st Dept. 1979) (affirming that "action for punitive damages cannot stand as a separate cause of action").

Plaintiffs here decided to forego the substantive cause of action created by Section 408 of the ATSSSA in which they could have asserted a claim for punitive damages. As a condition of receiving compensation from the VCF, Plaintiffs "waive[d] the right to file a civil action (or be party to an action) in any Federal or State court." ATSSSA § 405(c)(3)(B)(i). This waiver was included explicitly in the acknowledgment that Plaintiffs signed when they filed their VCF claims. *Virgilio*, 407 F.3d at 117. The Second Circuit correctly found that this waiver was the "functional equivalent of the satisfaction and release in *Rocanova*." *Id.* Once Plaintiffs' right to file a lawsuit was waived, "the parasitic claim for punitive damages was also extinguished." 407 F.3d at 117-118.

C. The Court Of Appeals Was Not Compelled To Certify A Question To The New York Court Of Appeals

Finally, Plaintiffs' request for *certiorari* to direct the Second Circuit to certify a question of law to the New York Court of Appeals should be denied. Pursuant to

New York Court of Appeals Rule 500.17 this Court or the Second Circuit "may certify a dispositive question of law to the Court of Appeals" if "determinative questions of New York law are involved in a cause pending before it for which there is not controlling precedent of the Court of Appeals." Plaintiffs argue that there is "no controlling precedent" in New York law on the question of whether a claim for punitive damages can stand once Plaintiffs waived their claim for compensatory damages. Petition at 24. Specifically, relying on *Mulder v. Donaldson Lufkin & Jenrette*, 623 N.Y.S.2d 560, 208 A.D.2d 301 (1st Dept. 1995), Plaintiffs argue that lower New York courts have announced exceptions to *Rocanova* and that the Second Circuit should have certified a question to the Court of Appeals regarding whether a plaintiff "can pursue a cause of action for punitive damages alone where the plaintiff's compensatory damages, but not his entire cause of action, has been satisfied." Petition at 24. The court below denied this request and, we respectfully submit, so should this Court.

As discussed above, the plain language of the ATSSSA's waiver of litigation provision does not distinguish between a claim for compensatory damages and a claim for punitive damages. Section 405 clearly provides that VCF claimants waive "the right to file a civil action." The waiver provision plainly applies to *all* civil actions, regardless of the nature of the damages sought. As discussed above, Plaintiffs have waived their claim and therefore have waived all damages attendant to it, be they compensatory or punitive.

Furthermore, *Mulder* does not announce an exception to the rule of *Rocanova*. As the court of appeals noted below, *Mulder* addresses the very narrow issue of "whether a plaintiff may seek punitive damages after receiving an award from an arbitrator." 407 F.3d at 118

n. 13. In *Mulder*, plaintiff received an arbitration award for compensatory damages arising from a claim for breach of contract. He then initiated a civil action seeking punitive damages arising from allegations of fraud related to the breach of contract claim. The Appellate Division expressly held that "plaintiff's cause of action for punitive damages cannot exist without a corresponding substantive cause of action." *Mulder*, 623 N.Y.S.2d at 565, 208 A.D.2d at 308. It then allowed plaintiff to pursue punitive damages based on the remaining cause of action for fraud that had not been addressed in the arbitration. Plaintiffs here have elected to forego their substantive cause of action and therefore any "action for punitive damages cannot exist." *Id.*

In *Mulder* plaintiff also did not *elect* to have his claim heard in a non-judicial venue. Rather, plaintiffs' claims were governed by the New York Stock Exchange rules, which provide that such claims *must* be heard before an arbitrator. Under New York law, arbitrators are not permitted to award punitive damages. Therefore, plaintiff was *forced* to bring his claims in a venue where his punitive damages claims could not be heard. The due process concerns implicated in such circumstances are simply not at stake in the election of remedy statute at issue here, where Plaintiffs *voluntarily* elected to receive a remedy from the VCF rather than pursue a civil action.

For these reasons, the Second Circuit was not required to certify a question to the Court of Appeals. *Rocanova* is a decision of the highest court in New York State, and no court has ever questioned the legitimacy of *Rocanova's* holding. *Mulder* addresses a distinct and non-analogous situation, and should not be invoked as a basis for requesting the New York Court of Appeals to revisit its decision in *Rocanova*.

CONCLUSION

For the foregoing reasons, Motorola respectfully requests that Plaintiffs' Petition for Certiorari be denied.

Dated: New York, New York
December 16, 2005

Respectfully submitted,

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No. 05-488

IN THE

Supreme Court of the United States

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(*caption continued on inside front cover*)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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TABLE OF AUTHORITIES

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Statutes, Rules, and Legislative History:

Petitioners' Reply Brief in Support of Petition for Writ of Certiorari

1. Neither respondent challenges petitioners' suggestion that the Court may and has invoked its certiorari jurisdiction to resolve intra-circuit conflicts, especially where, as here, the conflict emerges in a dramatic fashion after the court of appeals' decision in the case that is the subject of the petition. *United States v. Johnson*, 316 U.S. 649 (1942); *Maggio v. Zeitz*, 333 U.S. 56, 59-60 (1948); *Kent v. United States*, 383 U.S. 541, 557 n.27 (1966). Respondents also fail to respond to the critical point that, in this case, the intra-circuit conflict occurs in an extraordinary context where Congress has created exclusive original and appellate jurisdiction in a single circuit to insure uniformity of decision in cases arising from a unique national tragedy. The Second Circuit's failure to resolve that conflict cries out for the Court's exercise of its supervisory powers pursuant to its certiorari jurisdiction.

2. Respondents' attempt to deny or to gloss over the conflict in Second Circuit decisions is futile and depends on wholly conclusory and inaccurate assertions. Motorola argues that the decisions in *Canada Life Assurance Co. v. Converium Ruckversicherung (Deutschland) AG*, 335 F.3d 52 (2d Cir. 2003), and *In re WTC Disaster Site*, 414 F.3d 352 (2d Cir. 2005), are irrelevant because they construed § 408 of the Air Transportation Safety and System Stabilization Act ("ATSSSA"), 49 U.S.C. § 40101 note, Pub. L. No. 107-42, 115 Stat. 230 (2001), while this case involves the interpretation of § 405 of the same statute. According to the rather startling proposition repeatedly propounded by respondents, separate sections of the same statute should be construed in isolation, and not necessarily consistently. Mot. Br. in Op. at 14; City Br. in Op. at 12-13. Such a proposition has never been the

law, and it certainly was not followed by the Second Circuit panel in the *WTC Disaster Site* case.

Indeed, Motorola's naked assertion that "*In re Disaster Site* addressed solely the language of § 408 of the ATSSSA" (Mot. Br. in Op. at 13) is belied by the opinion itself. The court stated that it was "considering the statute as a whole and the differences between its relevant parts," *In re WTC Disaster Site*, 414 F.3d at 375, and then explicitly "compared [§ 408] against § 405," interpreting § 408 in light of the differences between the two sections. *Id.* The court found it "significant" that

> whereas § 405 relief [and waiver] is limited to injuries suffered "as a result of" the air crashes, the scope of § 408, dealing with "*all* actions brought for *any* claim . . . resulting from *or relating to*" the crashes (emphasis added [by court]) is clearly broader.

In re WTC Disaster Site, 414 F.3d at 376. The court's construction of § 408 was thus premised on its comparative analysis of the two sections.

In contrast, the panel in the instant case failed to construe § 405 in the overall context, structure and language of the entire statute, and concluded, in a manner fundamentally inconsistent with the holdings in both *Canada Life* and *In re WTC Disaster Site*, that § 405 encompassed all "but for" claims, *i.e.*, all claims for damages sustained that would not have arisen if the hijackings and crashes had not occurred:

> [T]he injuries to plaintiffs and their loved ones resulted from a series of interrelated acts that began with the terrorist attack.[1] Even assuming indepen-

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[1] In fact, petitioners' injuries resulted from a series of acts that began well before the terrorist attacks, consisting of the culpable acts of Motorola and the City. Those acts only bore bitter fruit on September 11, 2001.

> dent, successive tortious acts by both the terrorists and the defendants, . . . we are hard pressed to find plaintiffs' damages did not result—*at least in part*—from the terrorist attacks.

Pet. 15a (emphasis added). The opinion of the panel below is incompatible with the *In re WTC Disaster Site* panel's conclusion that the scope of § 408 is "clearly broader" than § 405, 414 F.3d at 376, and the *Canada Life* panel's holding that even § 408 does not encompass all "but for" claims. 335 F.3d at 59.

The court in *In re WTC Disaster Site* was surely correct in analyzing and construing § 408 in light of the overall language, structure and context of the statute. Respondents' arguments that § 405 should be construed *in vacuo* without reference to the rest of the statute is contrary to all established precedent. Rather, a court must look to "the plain meaning of the whole statute, not of isolated sentences," *Beecham v. United States*, 511 U.S. 368, 372 (1994), "by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). "The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).

Respondents ignore these cases, and many more like them. Instead, Motorola inappropriately cites *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992), for the proposition that § 405 should be construed without reference to § 408's use of the virtually identical term ("as a result of" in § 405; "resulting from" in § 408). But *Estate of Cowart* stands precisely in opposition to the proposition for which Motorola cites it. The Court in that case explicitly looked to the use of the term in ques-

tion ("person entitled to compensation") in other parts of the statute, 505 U.S. at 478-79, found that such other uses rendered "nonsensical" the construction proffered by the petitioner in that case, and applied "the basic canon of statutory construction that identical terms within an Act bear the same meaning. *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990); *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986)." *Id.* at 479. So too here, ATSSSA's use in § 408 of the term "resulting from" in contradistinction to the "clearly broader" term "relating to" renders "nonsensical" respondents' and the court of appeals' expansive and all-inclusive construction of the identical term "as a result of" in § 405.

3. Motorola recites (Br. in Op. at 10), without more, the court of appeals' incorrect conclusion that petitioners' construction of the term "as a result of" in § 405 is inconsistent with their claims for compensation from the Victim Compensation Fund for damages sustained as a result of the terrorist acts. Motorola, however, ignores and apparently has no persuasive response to petitioners' demonstration of the fallacy of that argument. See Petition at 17.

4. Respondents argue that since § 405 contains two specific narrow exceptions, the court of appeals properly declined to create "additional exceptions." Mot. Br. in Op. at 10-11; City Br. in Op. at 7. They both miss the point. Petitioners do not argue that § 405 should be construed as including an additional unstated exception, but rather that § 405's waiver provision simply does not extend to petitioners' claims against Motorola and the City. Since petitioners claims against respondents are not encompassed within the waiver provision, no "exception" to that provision is required, or urged here.

5. Respondents fall silent in the face of petitioners' showing that the term "damages sustained" has consis-

tently been construed by the Court and the lower federal courts as limited to compensatory damages and exclusive of punitive damages. Petition at 18-20. The court of appeals' construction of § 405's mandated waiver of claims for "damages sustained" as being the "functional equivalent" of the standard general release of "all debts, claims, demands, *damages, actions and causes of action,*" Pet. 21a (emphasis added), at issue in *Rocanova v. Equitable Life Assurance Society of United States*, 83 N.Y.2d 603, 634 N.E.2d 940 (1994), stands in sharp conflict with those decisions. Petitioners emphasize that in so holding, the court of appeals was not applying New York law, but rather was construing a federal statute in a manner contrary to established federal law. See Pet. at 22-23.

Once again, respondents do no more than repeat the error of the court of appeals. By equating the waiver of "damages sustained" to the broad general release in *Rocanova,* they then conclude that *Rocanova* bars petitioner's claims for punitive damages. Mot. Br. in Op. at 16-17; City Br. in Op. at 16-17. But petitioners did not execute a general release of all claims, causes of action, and damages, but rather waived certain claims for "damages sustained" only. *Rocanova* is thus irrelevant to the facts of this case, and the court of appeals' construction of § 405 based upon the general release in *Rocanova* is entirely misplaced, as well as being a question of *federal*, not state, law. See Pet. at 22-23.

6. There is no definitive New York state authority on whether a party may bring a lawsuit to recover punitive damages, where the party's claim to compensatory damages has already been resolved. The only case is the decision by the Appellate Division in *Mulder v. Donaldson, Lufkin & Jenrette*, 208 A.D.2d 301, 623 N.Y.S.2d

560 (1st Dept. 1995), discussed in the Petition at 23-24.[2] Under *Mulder*, plaintiffs may proceed on causes of action that support their claims for punitive damages "even though precluded from recovering compensatory damages on [those] substantive cause[s] of action." *Id.* at 565.

Respondents do not deny that the Court has strongly encouraged use of procedures for certification of state law questions, and has acted accordingly. *Lehman Bros. v. Schein*, 416 U.S. 386 (1974); *Bellotti v. Baird*, 428 U.S. 132 (1976); *Brockett v. Spokane Archives, Inc.*, 472 U.S. 491, 510 (1985) (O'Connor, J., concurring). Respondents merely argue that the court of appeals properly applied the relevant New York law. As we have shown, that is incorrect. Thus, to the extent that a question of New York ultimately may control the outcome of this case, the Court, as in *Belotti*, should remand to the court of appeals to certify the question.

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[2] Motorola inaccurately argues that *Mulder* merely permitted the plaintiff to proceed on a separate "remaining cause of action for fraud that had not been addressed in the arbitration." Mot. Br. in Op. at 19. To the contrary, the *Mulder* court permitted the plaintiff to pursue punitive damages for the exact same claim for which he received compensatory damages in arbitration: breach of contract "involv[ing] a fraud evincing a 'high degree of moral turpitude.' " 623 N.Y.S.2d at 565.

Conclusion

For the reasons stated above and in the Petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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